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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 501

WALTER R. DOLLOFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 65–70) is reported in 121 F. (2d) 157. The findings of fact and conclusions of law of the District Court, overruling petitioner's plea in bar, appear at R. 40–44.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 8, 1941 (R. 70–71). The petition for writ of certiorari was filed August 11, 1941. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the Liquor Enforcement Act of 1936, prohibiting the importation of intoxicating liquor into any state wherein the sale of such liquor containing more than 4 percent of alcohol by volume is prohibited, applies to the State of Kansas, wherein the sale of intoxicating liquor containing more than 3.2 percent of alcohol by weight is prohibited.[1]

STATUTES INVOLVED

The Liquor Enforcement Act of 1936 (Act of June 25, 1936, c. 815, sec. 3, 49 Stat. 1928, 27 U. S. C. Supp. V, sec. 223), and the pertinent provisions of the laws of Kansas relating to the sale of intoxicating liquor are set forth in the Appendix A, *infra*, pp. 8–9.

STATEMENT

Petitioner was convicted (R. 17) and sentenced to 90 days' imprisonment (R. 17–18) by the United States District Court for the Western District of Missouri on an information (R. 1–2) charging an

[1] It is not denied that Kansas comes within the other conditions of the Liquor Enforcement Act of 1936 (see *infra*, p. 8).

attempt to transport intoxicating liquor out of the State of Missouri and into the State of Kansas, in violation of the Liquor Enforcement Act of 1936. Contending that the Act does not apply to the State of Kansas since the 3.2 percent of alcohol by weight prescribed in the Kansas statutes permits the sale of liquor containing more than 4 percent of alcohol by volume, petitioner interposed a plea in bar in which he moved to quash the information (R. 28–29). After hearing evidence (R. 30–39), the court overruled the plea (R. 44), making findings of fact and conclusions of law (R. 40–44). A demurrer to the information (R. 4–5) and a motion for judgment of acquittal (R. 15–16), based also upon the same ground, were likewise overruled (R. 16).

The Circuit Court of Appeals affirmed the conviction. After pointing out that in a prior case (*Arnold* v. *United States,* 115 F. (2d) 523) it had refused to hold the Liquor Enforcement Act of 1936 applicable to Kansas because there was no proof in the record concerning the relation between 3.2 percent of alcohol by weight and 4 percent by volume, the court held (R. 68) that there was in the instant record substantial testimony to support the trial court's finding (R. 43) that an alcoholic beverage containing 3.2 percent of alcohol by weight will contain approximately 4 percent of alcohol by volume. The appellate court also found that scientific authorities and standard encyclopedias corroborated this testimony (R. 69), and that the legislative history of the Liquor Enforcement

Act of 1936, as reflected in a congressional committee report indicated that Congress, in enacting the legislation, "considered that 4 percent by volume and 3.2 percent by weight were equivalents, if not identical" (R. 69).

There was testimony that whiskey, brandy, gin, beer, and wine are the alcoholic beverages commonly used in this country and that whiskey, gin, and brandy contain a much greater percentage of alcohol than either 4 percent by volume or 3.2 percent by weight (R. 31). There was evidence that ordinary beers contain between 4 and 6 percent solids (R. 38), and that "In a beer which contains 3.2% of alcohol by weight and 6.2 [%] of solids, the alcoholic percentage by volume is 4.1" (R. 37).[2] The reduction of the solid content results in a reduction of the alcoholic content by volume (R. 37–38).[3] While a witness for the petitioner testified that he prepared an experimental solution of alcohol, sugar, and water which contained 3.2 percent of alcohol by weight and approximately 4.9 percent of alcohol by volume (R. 30–31), there was testimony that no such beverage was known on the market and that no one would want to drink such a mixture (R. 34).

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[2] One witness said that ordinary beers containing 3.2 percent of alcohol by weight would contain 4.1 or 4.2 percent of alcohol by volume (R. 33).

[3] None of the testimony related specifically to wines. However the district court in its findings treated wines containing 3.2 percent of alcohol by weight as falling within the same category as beers of that type (R. 42).

ARGUMENT

There can be no doubt that Kansas thought its legislation brought it within the protection of the Liquor Enforcement Act of 1936 (sec. 6, Kans. Laws, 1939, c. 179, *infra,* p. 9). And petitioner admits that Congress, as is evident from the congressional committee report,[4] considered, when it passed the Liquor Enforcement Act, that "a measurement of 4 percent of alcohol by volume was identical with a measurement of 3.2 percent of alcohol by weight" (Pet. 30). Also, the evidence clearly justified the findings below that the two percentages are approximately (R. 43) or substantially (R. 69) the same, a conclusion corroborated by scientific authorities and standard encyclopedias to which reference was made (R. 42, 69, 70).

But the petitioner contends that the congressional committee report cannot be utilized in ascertaining

[4] In H. Rept. No. 1258, 74th Cong., 1st Sess., p. 1, the Committee on the Judiciary, in stating the purpose and scope of the legislation, said: "The purpose of the bill is to enforce the twenty-first amendment * * * which guarantees Federal protection to 'dry' States against liquor-law violations directed from outside their borders. The bill extends this affirmative protection to States which forbid all sales for beverage purposes of intoxicating liquor containing more than 4 percent of alcohol by volume (*3.2 percent of alcohol by weight*). Your committee felt it was essential to protect States which permit the sale of liquor containing as much as 4 percent of alcohol by volume, in order to keep faith with the action taken by Congress in the so-called 'Cullen Beer Act' of March 22, 1933, which legalized light wines and beers *containing not more than 3.2 percent of alcohol by weight.*" [Italics supplied.]

the legislative intent in extending the protection of the Act only to those states which prohibit the sale of intoxicating liquor "containing more than 4 per centum of alcohol by volume," because these words are *per se* unambiguous and are not rendered ambiguous by anything else in the statute (Pet. 28, 31–40). But, as made clear by the record here, the application even of precise measurements is not free from ambiguity. And, as this Court said in *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 543–544: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use [citing *Boston Sand & Gravel Co.* v. *United States,* 278 U. S. 41, 48], however clear the words may appear on 'superficial examination.' "

The two circuits which are most concerned with the question here presented are the Eighth and the Tenth, Kansas being in the Tenth and both circuits comprising states adjacent to Kansas.[5] The con-

[5] The only two so-called "dry" States which have sought to avail themselves of the protection of the Liquor Enforcement Act of 1936 are Kansas and Oklahoma. Since its decision in the present case the Circuit Court of Appeals for the Eighth Circuit in *Flippin* v. *United States* (unreported, but printed in Appendix B, *infra*, p. 10) has held the Act to apply to Oklahoma. While the court felt that it might perhaps rest its determination upon the decision in the instant case, it referred to additional considerations peculiar to Oklahoma. In the *Flippin* case a petition for rehearing was denied on August 28, 1941, and the mandate has been stayed for 30 days to permit application to this Court for a writ of certiorari.

struction of the statute by the Circuit Court of Appeals for the Eighth Circuit in the present case has settled such confusion as may have existed because of diverse decisions by district judges in that circuit. In the Tenth Circuit no ruling upon the question has yet been made by the Circuit Court of Appeals. The only reported decision in that circuit is a district court decision and it held that the statute applies to Kansas. (See Pet. 24, 42.) We know of no contrary decisions in the district courts of the Tenth Circuit. Until the Circuit Court of Appeals for that circuit rules against the applicability of the statute to Kansas, there would seem to be no necessity for the granting of a writ of certiorari by this Court.

CONCLUSION

The construction of the Liquor Enforcement Act by the circuit court of appeals is in accord with the manifest congressional intent and there is involved no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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SEPTEMBER 1941.

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